

1 **LAW OFFICES OF MARC J. WODIN**  
2 Marc J. Wodin, Esq. - SBN 79573  
3 Elana Bitton, Esq. - SBN. 130835  
23901 Calabasas Road, Suite 1076  
Calabasas, California 91302  
Telephone (818) 595-3490  
4 Fax (818) 225-7497  
e-mail marc\_wodin@wodinlaw.com  
5

6 Attorneys for Defendant CONSECO SENIOR HEALTH INSURANCE COMPANY  
7

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10  
11 PAMELA THOMPSON, Individually )  
and as Personal )  
12 Representative of CHARLES )  
THOMPSON, Deceased, )  
13 )  
Plaintiff, )  
14 )  
vs. )  
15 )  
CONSECO SENIOR HEALTH )  
16 INSURANCE COMPANY, a )  
Pennsylvania corporation, )  
17 DOES 1 through XX )  
18 )  
Defendant(s). )  
19 \_\_\_\_\_)

CASE NO.: C 07-05437 PJH  
[Sonoma County Superior  
Court Case No. 241544]

**DECLARATION OF MARC J. WODIN  
RE DEFENDANT'S MOTION FOR AN  
ORDER COMPELLING MEET AND  
CONFER AND/OR ENFORCING  
SETTLEMENT ETC.**

**DATE: October 29, 2008  
TIME: 9:00 a.m.  
CTRM: 3**

**[FILED CONCURRENTLY WITH  
MOTION TO CHANGE TIME]**

Assigned to the Honorable  
Phyllis J. Hamilton

21 **DECLARATION OF MARC J. WODIN**  
22

23 I, MARC J. WODIN, DECLARE:

24  
25 1. The facts set forth herein are personally known to  
declarant, who has firsthand knowledge of the same, and if called  
26 as a witness, said declarant could and would competently testify  
27  
28

1 thereto under oath.

2

3       2. I am an attorney duly admitted to practice before this  
4 court, and I am a principal in the Law Offices of Marc J. Wodin,  
5 attorneys of record for defendant Conseco Senior Health Insurance  
6 Company ("Conseco") in the above entitled action.

7

8       3. I have been practicing as an attorney in California since  
9 1978. I practiced in California State Courts, and in all of the  
10 Federal District Courts, in California. Over the years, I have  
11 personally attended hundreds of mediations, in cases pending in  
12 both State and Federal Court. I have also served as a court  
13 appointed mediator. I have knowledge of the process of mediation,  
14 including the process which is commonly followed when a  
15 settlement is reached at a mediation, in actions pending in both  
16 California State and Federal Courts, as hereinafter set forth.

17

18       4. When a settlement is reached at a mediation, it is often  
19 not feasible to then and there prepare a comprehensive settlement  
20 agreement. To make the settlement binding, the parties and their  
21 attorneys often sign a brief memorandum, setting forth essential  
22 terms, in cursory, bullet point, form, with a proviso that a  
23 settlement agreement - the formal document with the provisions,  
24 terms and language appropriate to such - will be prepared  
25 thereafter, usually by the defendant, which is seeking to "buy  
26 its peace," and reasonably wants provisions, terms and language,  
27 which will accomplish that purpose, to its satisfaction. In such

28

1       circumstances, it is common for defendant's attorney to provide a  
 2 proposed agreement to the plaintiff's attorney, and for the  
 3 attorneys to meet and confer to resolve any differences that may  
 4 arise on the language.

5

6           5. On January 31, 2008, the court issued an order, referring  
 7 this matter to mediation. Attached hereto as Exhibit 1 is a true  
 8 and correct copy of the Order.

9

10          6. On February 14, 2008, the court issued a Notice of  
 11 Appointment of Mediator, notifying the parties that attorney John  
 12 Koeppel, of the Law Office of Ropers, Majeski, Kohn & Bentley,  
 13 210 Spear Street, Suite 1000, San Francisco CA 94105, was  
 14 assigned as the mediator. Attached hereto as Exhibit 2 is a true  
 15 and correct copy of the Notice.

16

17          7. A mediation was scheduled for May 29, 2008, at the  
 18 mediator's office, and went forward on that date, and at that  
 19 place. The following persons attended the mediation, in addition  
 20 to Mr. Koeppel: plaintiff Pamela Thompson; attorney Michael P.  
 21 Guta, of the Law Offices of John E. Hill, attorneys for  
 22 plaintiff; Steven Huffer, Associate General Counsel for defendant  
 23 Conseco Senior Health Insurance Company, and; myself, as attorney  
 24 for defendant Conseco Senior Health Insurance Company

25

26          8. A settlement was reached at the mediation. A one page  
 27 memorandum was prepared, with the word "Thompson" at the top, and

28

1 which set forth essential terms of the settlement, in cursory,  
2 bullet point form, as follows:

3

4                   Defendant will pay plaintiff and her attorneys \$17,500.

5

6                   Plaintiff will dismiss the entire action with  
7 prejudice.

8

9                   There will be no further claims made under the policy.

10

11                  Plaintiff and her attorneys will execute a release and  
12 settlement agreement provided by defendant which will include a  
13 provision for confidentiality.

14

15                  The settlement is enforceable pursuant to CCP §664.6.

16

17                  The memorandum was signed and initialed by Ms. Thompson, Mr.  
18 Guta, Mr. Huffer, and myself, at the time of the mediation.

19                  Attached hereto as Exhibit 3 is a true and correct copy of  
20 the memorandum.

21

22                  9. At the mediation, plaintiff's attorney asked when the  
23 settlement check could be provided. After speaking with Mr.  
24 Huffer, I told him that it was anticipated that the check could  
25 be provided within several weeks of my receipt of the executed  
26 Agreement and the Dismissal.

27

28

1       10. On June 2, 2008, the mediator filed a Certification of  
 2 ADR Session, stating that the case settled at the mediation.  
 3 Attached hereto as Exhibit 4 is a true and correct copy of the  
 4 Certification.

5

6       11. On June 5, 2008, the court issued an Order of Dismissal,  
 7 dismissing the action without prejudice, which dismissal would be  
 8 vacated, and the action restored to the calendar, if any party  
 9 certified to the court, within 60 days, that agreed upon  
 10 consideration for the settlement had not been delivered over.  
 11 Attached hereto as Exhibit 5 is a true and correct copy of the  
 12 Order

13

14       12. On June 16, 2008,<sup>1</sup> I wrote to plaintiff's attorney,  
 15 enclosing a Release and Settlement Agreement ("the Agreement") -  
 16 Conseco's standard Agreement, modified in certain respects for  
 17 the particularities of the settlement, with provisions, terms and  
 18 language, stated with particularity, usual and appropriate to  
 19 such a document <sup>2</sup> - and a Dismissal. Attached hereto as Exhibit 6

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21       <sup>1</sup> The process was delayed, for several weeks, by the failure  
 22 of plaintiff's attorney to respond to telephonic requests from me  
 23 and my associate for information as to how the settlement check  
 24 was to made payable, to be included in the Agreement, which  
 25 information was finally received on June 16, 2008.

26

27       <sup>2</sup> e.g., the identification of the document, the parties, the  
 28 action, and statement of the fact of settlement; the amount of  
 payment to be made by and who it would be made to; a timetable  
 for plaintiff to provide the executed Agreement and Dismissal,  
 and for defendant to make payment; that defendant was not  
 responsible for paying any other sums; that defendant was not be  
 responsible to taxing authorities for any tax liability incurred

1 is a true and correct copy of the letter, Release and Settlement  
 2 Agreement and Dismissal.

3

4       13. On June 20, 2008, I received a letter from plaintiff's  
 5 attorney, in which he said that he had "concerns" with the  
 6 language of two of the provisions (a provision which provided for  
 7 liquidated damages in the event of breach of the confidentiality  
 8 provision, and a venue provision). Attached hereto as Exhibit 7  
 9 is a true and correct copy of the letter.

10

11       14. I promptly faxed a letter to plaintiff's attorney,  
 12 saying that I was "happy to discuss" any "changes" he wanted to  
 13 make in language, and requesting, that he "please call" so that  
 14 we could do so. Attached hereto as Exhibit 8 is a true and  
 15 correct copy of the letter.<sup>3</sup> <sup>4</sup>

16

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17 by plaintiff related to the payment; that no further benefits  
 18 would be paid under the policy; the terms of release; that  
 19 plaintiff would dismiss the action with prejudice; plaintiff's  
 20 authority to file the action and dismiss it; that the settlement  
 21 was not an admission of liability; that plaintiff was not  
 22 entering into the settlement based on any representation of  
 23 defendant; that plaintiff was over the age of 18, had read the  
 24 Agreement, and was acting after securing the advice of counsel;  
 25 that if any part of the Agreement was held to be invalid, it  
 26 would not effect the remaining portions; confidentiality of the  
 settlement and facts and circumstances of the action; venue; that  
 this was the entire agreement; that the parties would do such  
 acts as might reasonably be required to carry out the Agreement;  
 that each party and their attorneys had reviewed the Agreement,  
 and the rule of ambiguities was not applicable; that the  
 Agreement could not be modified except in writing signed by the  
 parties; that the Agreement could be executed in parts.

27       <sup>3</sup> "If there are provisions of the release which you wish to  
 28 have changed, as seems to be the case, then please call me, and I

1           15. Plaintiff's attorney did not respond to my request.

2

3           16. On June 27, 2008, I faxed a second, follow up, letter to  
 4 plaintiff's attorney, noting that I had not heard from him, and  
 5 stressing that we needed to resolve matters related to the  
 6 language of the release. Attached hereto as Exhibit 9 is a true  
 7 and correct copy of the letter.<sup>5</sup>

8

9           17. Plaintiff's attorney did not respond to this letter,  
 10 either.

11

12           18. After waiting another week, on July 3, 2008, I faxed a  
 13 third letter to plaintiff's attorney, again noting that I had not

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15 will be happy to discuss them with you. You mention some things  
 16 in your letter. However, I cannot tell whether those are the only  
 17 things you have a question about, and it makes no sense to do  
 18 this on a piecemeal basis."

19

20           <sup>4</sup>At the mediation, plaintiff's attorney asked when the  
 21 settlement check could be provided. I told him that it was  
 22 anticipated that the check could be provided within several weeks  
 23 of my receipt of the executed Agreement and the Dismissal.

24           In his letter of June 20, 2008, plaintiff's attorney said  
 25 that it was his understanding that the settlement check would be  
 26 received within 2 weeks of the mediation, and complained that it  
 27 had not been provided.

28           In my responsive letter of June 20, 2008, I reminded  
 29 plaintiff's attorney that what he was told, at the mediation, was  
 30 that the check could be provided within a few weeks of his  
 31 providing the executed Agreement and Dismissal. Further, it was  
 32 plaintiff's attorney who had caused a delay, by failing to  
 33 provide requested information concerning the payee on the  
 34 settlement check, which delayed completion of the Agreement.

28

29           <sup>5</sup>"I have not heard back from you in response to my letter of  
 30 June 20. We need to resolve matter related to the release  
 31 language.

1 received a response, and again asking him to contact me, so we  
 2 could resolve issues related to the release language. Attached  
 3 hereto as Exhibit 10 is a true and correct copy of the letter.<sup>6</sup>

4

5       19. Once again, plaintiff's attorney did not respond.

6

7       20. Rather, eleven days later, plaintiff's attorney wrote,  
 8 asserting a new position (inconsistent with the position  
 9 expressed in prior letter, that he only had a concern  
 10 about two of the provisions of the Agreement). He now asserted:

11       1. that the five sentence memorandum prepared at the  
 12 mediation was the settlement agreement, and that document, with  
 13 those five sentences, as the only document, and all that could be  
 14 said, to express the terms of settlement - there could be no  
 15 comprehensive settlement agreement with provisions, terms and  
 16 language, such as were contained in the Release and Agreement  
 17 provided by me to him.

18       2. The only additional thing to be done, according to  
 19 plaintiff's attorney, was to physically affix to the five  
 20 sentence memorandum, several sentences of language concerning  
 21 release and confidentiality, as demanded and phrased by him.  
 22 Attached hereto as Exhibit 11 is a true and correct copy of the

23

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26       <sup>6</sup> "I have now written two letters to you concerning resolving  
 27 issues related to the release, to which I have received no  
 28 response. I have the settlement check. Again, please contact me  
 so we can resolve these issues."

1 letter.<sup>7</sup>

2

3       21. On July 17, 2008, I faxed a letter to plaintiff's  
4 attorney, expressing strong disagreement with his assertions:

5           - Agreements for settlement are interpreted under the rules  
6 applicable to contracts generally, one of which is that  
7 they are interpreted to express the mutual intent of the parties,  
8 which is determined from an objective consideration of the  
9 language of the document and the circumstances under which it was  
10 prepared.

11           - The reasonable interpretation of the language of the  
12 memorandum, and consideration of the circumstances under which it  
13 was prepared, is consistent with the preparation of comprehensive  
14 Release and Settlement Agreement, with provisions, terms and  
15 language appropriate to such a document:

16       The parties reached a settlement at a private mediation. It  
17 was not feasible to then and there prepare a comprehensive,  
18 formal agreement. Common to such a circumstance, a cursory,

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21           <sup>7</sup> As discussed hereinafter, the Agreement provided by me to  
22 plaintiff's attorney contained language of release, which set  
23 forth, with particularity, the releasee, the releasor, and the  
24 matters released. Plaintiff's attorney demanded that the language  
25 of release consist of a sentence, which said something about some  
26 unidentified releasor being released from some vague and  
27 unspecified matters related to a misidentified insurance policy.

28

         Likewise, the Agreement contained language of  
25 confidentiality, which set forth, with particularity, what was  
26 encompassed as being confidential, and who and under what  
27 circumstances confidential matters could and could not be  
28 disclosed. Plaintiff's attorney demanded that the that language  
of confidentiality consist of one sentence, which said that the  
terms of settlement were confidential.

1 bullet point memorandum was prepared, and signed by the parties,  
 2 to make the settlement binding, with an express proviso that  
 3 defendant would thereafter provide a Release and Settlement  
 4 Agreement. It is reasonable that the Release and Settlement  
 5 Agreement would include provisions, terms and language  
 6 appropriate to such a document, the preparation of such a  
 7 document is consistent with the wording of the memorandum and the  
 8 circumstances under which it was prepared, and there is nothing  
 9 in the language, or those circumstances, which is inconsistent  
 10 with such a thing.

11 - His assertion that the five sentence memorandum is the  
 12 Agreement was contrary to the language of the memorandum. The  
 13 memorandum doesn't say that it is the Release and Settlement  
 14 Agreement. It says defendant will be providing a Release and  
 15 Settlement Agreement.

16 - The memorandum does not state that the Agreement can only  
 17 consist of a literal recitation of the five, bullet point  
 18 sentences, set forth in the memorandum. In fact, it doesn't place  
 19 any limitations on the provisions, terms or language of the  
 20 Agreement, other than to say that it will contain a provision for  
 21 confidentiality.

22 - For the same reasons set forth above, his assertion that  
 23 the five sentence memorandum is the Agreement, and that the  
 24 Agreement cannot contain anything other than a literal recitation  
 25 of the five, bullet point sentences, set forth in the memorandum,  
 26 is inconsistent with a consideration of the circumstances under  
 27 which the memorandum was prepared.

28

1           - His assertion was inconsistent with his own prior letter,  
 2 wherein he said that he only had a problem with the language of  
 3 two of the provisions of the Agreement.

4           - The memorandum said that defendant would provide language  
 5 of Release. The Agreement provided by defendant contains language  
 6 of release, which sets forth, with particularity, the releasee,  
 7 the releasor, and the matters released.<sup>8</sup> Defendant has the right  
 8 to have language of release which was full, complete, and  
 9 reasonable. Plaintiff's demand that the language of release  
 10 consist of a single sentence of release, which says something

11           <sup>8</sup> "3. As consideration for the payment of the sums specified  
 12 in paragraph 1, Plaintiff does hereby release, acquit and forever  
 13 discharge the Released Parties, of and from any and all claims,  
 14 demands, disputes, losses, or causes of action, known or unknown,  
 15 foreseen or unforeseen, in law or in equity, which the Plaintiff  
 16 has, has ever had, may ever have, or which may hereafter accrue  
 17 or be acquired, against the Released Parties, relating to or  
 18 concerning the Policy, and any claims which were or could have  
 19 been asserted in the Action. Plaintiff further covenants and  
 20 agrees that neither she nor anyone authorized to act on her  
 21 behalf will commence, authorize, or accept any benefit from any  
 22 judicial or administrative action or proceeding, other than as  
 23 expressly provided for in this Agreement, against the Released  
 24 Parties, or any of them, in either their personal or corporate  
 25 capacity, with respect to any claim, matter, or issue that in any  
 26 way arises from, is based on, or relates to any alleged loss,  
 27 harm, or damages allegedly caused by the Released Parties, or any  
 28 of them, in connection with the released claims referenced in  
 this paragraph and paragraph 5 of this Agreement."

22           "4. The release and covenant not to sue set forth in  
 23 paragraph 3 above specifically includes, but is not in any way  
 24 limited to: (a) any and all claims against the Released Parties  
 25 on account of, arising out of, or in any way relating to the  
 26 Policy; (b) any and all claims against the Released Parties on  
 27 account of, arising out of, or in any way relating to the Action;  
 28 (c) any damages which were or could have been claimed in the  
 Action including, but not limited, any extra-contractual damages  
 suffered at any time by reason of any of the conduct alleged in  
 the Action, or the continued effects thereof, or as referenced in  
 (a) and (b) of this paragraph."

1 about some unidentified releasor being released from some  
 2 unspecified matters related to a misidentified insurance policy,  
 3 was vague, incomplete, and essentially meaningless.<sup>9</sup>

4 - The memorandum said that defendant would provide a  
 5 provision for confidentiality. Defendant has the right to have  
 6 language of confidentiality which was full, complete, and  
 7 reasonable. The Agreement provided by defendant contains  
 8 language of confidentiality, which sets forth, with  
 9 particularity, what is encompassed as being confidential, and who  
 10 and under what circumstances confidential matters could and could  
 11 not be disclosed.<sup>10</sup> The single sentence of confidentiality

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12  
 13       <sup>9</sup> "Releasor Pamela Thompson acknowledges and agrees that this  
 14 release applies to all claims that Releasor may have against  
 15 Releasee [nowhere defined] arising out of Transport Life  
 16 Insurance company Policy of Insurance No. 1101-CA [which is not  
 17 a correct identification of the subject policy] for injuries,  
 damages, or losses to Releasor's personal and property, real or  
 personal [whatever that means], whether those injuries, damages  
 or losses are known or unknown, foreseen or unforeseen, or patent  
 or latent [whatever that means]."

18       <sup>10</sup> "16. Plaintiff and her attorneys in the Action agree that  
 19 the terms of this Agreement (including but not limited to the  
 20 amount of the payment recited herein and the basis on which said  
 21 payments are computed), the nature and circumstances of the  
 22 dispute between the parties, and the factual background of the  
 23 Action, are confidential. Plaintiff and her attorneys in the  
 24 Action further understand and agree that while each may state  
 25 that a settlement has been reached, except as provided in this  
 26 paragraph, they may not disclose confidential information, to  
 27 third parties, orally or in writing.

28       Confidential information shall not be disclosed, revealed,  
 29 or divulged, by plaintiff or her attorneys, to any person, firm,  
 30 corporation, news media, or to any other entity whatsoever, with  
 31 the following exceptions, and then only to the extent reasonably  
 32 necessary: (a) to governmental taxing authorities; (b) to  
 33 plaintiff's and her attorneys' accountants and tax preparers; (c)  
 34 when required by order or a court of competent jurisdiction or  
 35 otherwise compelled by law, or; (d) with the prior written

1 demanded by plaintiff's attorney - that the terms of the  
 2 settlement are confidential, is even more vague, incomplete, and  
 3 meaningless that his demanded language of release.<sup>11</sup> It doesn't  
 4 even say what confidentiality is, or means - i.e. that  
 5 confidential information cannot be disclosed. It doesn't  
 6 encompass plaintiff's attorney. Further, it doesn't encompass the  
 7 facts and circumstances of the case.<sup>12</sup>

8 I concluded the letter requesting, for the fourth time, that  
 9 we meet and confer in an attempt to resolve these issues.<sup>13</sup>

10 Attached hereto as Exhibit 12 is a true and correct copy of  
 11 the letter.

12

13 22. Once again, plaintiff's attorney did not respond to my  
 14 request.

15

16

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consent of all parties.

17 No party or their attorneys shall categorize this Agreement  
 18 or the outcome of the Action as a victory for themselves, or a  
 19 defeat of the other party, or suggest that this Agreement, or the  
 20 terms thereof, constitute something other than the settlement of  
 a dispute without an admission or finding of liability on the  
 part of either party.

21 The promises of confidentiality as provided in this  
 22 paragraph are material inducements to Defendant to enter into  
 this Agreement and are of the essence of this Agreement."

23

11 "The parties agree that the terms of the settlement are  
 24 confidential."

25

12 I told plaintiff's attorney, at the mediation, that  
 26 confidentiality would encompass the settlement and the facts and  
 27 circumstances of the action.

28

13 "I continue to be open to discussing modification of the  
 27 release and settlement agreement which I provided to you, if you  
 have some problem with the specific language therein."

1       23. On August 4, 2008, I filed a Certification that  
2 plaintiff had not delivered agreed upon consideration for the  
3 settlement, and requested that the dismissal be vacated, and the  
4 action be restored to the calendar. Attached hereto as Exhibit 13  
5 is a true and correct copy of the Certification.

6

7       24. On August 11, 2008, the court issued an order vacating  
8 the dismissal, and setting a status conference. Attached hereto  
9 as Exhibit 14 is a true and correct copy of the Order.

10

11       25. I bill at the rate of \$160/hour on this matter. I have  
12 spent 25 hours preparing this motion. I anticipate that 5 hours  
13 will be spent appearing on this motion.

14

15       I declare under penalty of perjury under the laws of the  
16 United States of America that the foregoing is true and correct.

17

18       Executed this 2<sup>nd</sup> day of September, 2008, at Calabasas,  
19 California

20

21

/s/ Marc J. Wodin

\_\_\_\_\_  
MARC J. WODIN  
DECLARANT

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